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THE IMPACT OF INSURANCE ON THE LAW OF TORTS

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In considering the effect of liability insurance on tort law we meet a serious difficulty at the threshold. While the rules of liability have changed but little in the past half century, the practical effects stemming from the application of these rules have been altered materially. To obtain an accurate picture of the impact of insurance we must examine not only the legal doctrines themselves, but also the operation of these doctrines both in and out of court, as well as the every-day practices of the insurance carriers, which may or may not reflect the legal rules. Realistically viewed, the practices of the carriers have become just as much rules of law as the pronouncements of the courts interpreting traditional doctrines.

The general plan of this article will be to inquire into the changes which have taken place in legal rules as courts have gradually recognized the new factors that liability insurance has introduced into the social and economic structure. Effort will also be made to sketch, though not in great detail, some of the more important practices of insurance companies that have a bearing on the present problem. Consideration will be given to the inadequacies which exist in the present legal and insurance structures, and then to some of the possible ways of curing or at least ameliorating these difficulties.

I

INSURANCE AND MODIFICATION OF LEGAL RULES

A. In General

Some thirty-five years ago when workmen's compensation schemes were relatively new in the land, Jeremiah Smith speculated on their sequel in other areas of accident law. Among other things, he prophesied that the courts, by "indirect methods," might well "go far towards practically reversing the common law of A.D. 1900,"¹ in favor of earlier and stricter notions of liability. This prophecy was remarkably accurate. There has been a strong trend towards the adoption of procedural and substantive rules which *extend* liability for negligence and *cut down* defenses such as contributory negligence. This trend has been described in detail elsewhere. It is enough for present purposes simply to mention some of its salient manifestations. There has

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¹ Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 344, 367 (1914).

been a progressive abandonment of the older notion that the court rather than the jury should set the standard of conduct to be followed in particular cases, and this has made it easier for the plaintiff to get to the jury on the issues both of negligence and contributory negligence.² Liberalization of the doctrines of *res ipsa loquitur*,³ and last clear chance⁴ has had like effect on these respective issues. There has been notable extension of legal duties such as those of manufacturers and suppliers of chattels and those of occupiers of land to licensees and trespassers.⁵ It is no longer a bar to recovery for physical harm, in most jurisdictions, that it was brought about through emotional shock without impact.⁶ Courts are beginning to recognize recovery for pre-natal injuries.⁷

It cannot be shown, of course, that these extensions of liability are directly traceable to liability insurance. Yet there can be scarcely any doubt that the possibilities opened up by insurance for distributing losses over society, and for shielding individual defendants from the full impact of liability, have been important factors in producing a climate of opinion in which extension of liability is inevitable.

B. The Suit by the Unemancipated Minor

The suit by the unemancipated minor child against his parent affords an example of the way in which realistic recognition of the effect of insurance has been retarded by doctrinal considerations. The typical case involves this fact pattern. A minor child is riding in an automobile operated by his mother or father. There is an automobile accident, and the minor sues his parent. It develops that the parent is thoroughly protected by liability insurance, and the question is, "Will the suit be permitted?" Almost invariably the answer of the courts has been no.⁸

² Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); James, *Accident Liability: Some Wartime Developments*, 55 YALE L. J. 365, 374 *et seq.* (1946); Searl, *Automobile Liability Law Development & Trend*, 39 BEST'S INSURANCE NEWS 583 (Fire & Cas. ed. 1938) (hereinafter referred to as BEST's); Note, 15 BROOKLYN L. REV. 318 (1949).

³ See, for example, *Smith v. Pennsylvania Central Airlines Corp.*, 76 F. Supp. 940 (D. D. C. 1948), 47 MICH. L. REV. 855 (1949); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P. 2d 687 (1944), 208 P. 2d 445 (Cal. Dist. Ct. App. 1949), Seavey, Comment, 63 HARV. L. REV. 643 (1950); Note, 58 YALE L. J. 183 (1948); *Godfrey v. Brown*, 220 Cal. 57, 29 P. 2d 165 (1934).

⁴ WILLIAM L. PROSSER, *HANDBOOK ON THE LAW OF TORTS* §54 (1941); *Chesapeake & O. Ry. v. Pope*, 296 Ky. 254, 176 S. W. 2d 876 (1943); *Krause v. Pitcairn*, 350 Mo. 339, 167 S. W. 2d 74 (1942).

⁵ See, e.g., McNiece and Thornton, *Affirmative Duties in Tort*, 58 YALE L. J. 1272 (1949); Hudson, *The Turntable Cases in the Federal Courts*, 36 HARV. L. REV. 826 (1923); RESTATEMENT, TORTS §§329 *et seq.* (1934); *Wolfe v. Rehbein*, 123 Conn. 110, 193 Atl. 608 (1937); *Thompson v. Reading Co.*, 343 Pa. 585, 23 A. 2d 729 (1942).

⁶ See, for example, *Orlo v. Connecticut Company*, 128 Conn. 231, 21 A. 2d 402 (1941); Magruder, *Mental & Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); see, however, Note, 15 U. OF CHI. L. REV. 188 (1947). Even jurisdictions which adhere to the no-liability-without-impact rule have diluted its harshness with innumerable exceptions. McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S U. L. REV. 1 (1949).

⁷ *Williams v. Marion Rapid Transit*, 152 Ohio 114, 87 N. E. 2d 334 (1949); Note, *New Infant Rights in Tort*, 35 VA. L. REV. 618 (1949).

⁸ See, e.g., the case of *Villaret v. Villaret*, 169 F. 2d 677 (D. C. Cir. 1948). In that case a thirteen year old child was injured when the automobile in which he was riding and which was operated by his mother collided with another car. The infant by his next friend sued the mother for damages, and the

The theory upon which the unemancipated minor has been denied recovery is that the allowance of a suit by an unemancipated child against its parent tends to disrupt domestic tranquility and, also, is unfair to the remaining children because a certain portion of the family funds is irrevocably set apart for the plaintiff-child.⁹ Manifestly there is no such danger when the presence of the liability insurance is considered. In practical effect the suit is not brought by the minor against his parent but rather by the minor against the insurance company. The only real danger in the picture is that fraud may be perpetrated by the infant and his family upon the insurance company,¹⁰ and the watchfulness of insurers is probably a reasonably satisfactory safeguard against that danger.¹¹ None the less, few courts have seen fit to modify the principles of law which may have been appropriate in pre-insurance days but have little logical application today.

Dunlap v. Dunlap,¹² although itself involving an emancipated child, is perhaps a signpost in the direction of more realistic appraisal of the unemancipated minor situation. There the New Hampshire court indicated that the rule of non-liability

circuit court interpreting Maryland law held that the infant could not sue even though the parent was protected by liability insurance.

A landmark earlier case in this area was *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923), where the court indicated that the presence of insurance would not alter the usual rule forbidding suit by the unemancipated minor against his parent. A strong dissent pointed out the inapplicability of the family disruption argument where insurance existed, but the majority of the court chose to adhere to the traditional rule. Had the views of the dissenter prevailed in that case, the subsequent development of the law might have been markedly changed. For still earlier roots of the law, see *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). See also *Shaker v. Shaker*, 129 Conn. 518, 29 A. 2d 765 (1942); *Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930); *Norfolk Southern R.R. v. Gretakis*, 162 Va. 597, 174 S. E. 841 (1934); and *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

⁹ *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930) contains a good exposition of the premises underlying the traditional doctrine, although it rejects such premises. See also *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929), intimating that recovery might be allowed the minor if a suit could be maintained directly against the insurer. However, despite the fact that under Wisconsin law an automobile insurer can be joined as a defendant and can be held directly liable to the injured person, even where there is a "no action" clause in the policy, it should be observed that Wisconsin has apparently not relaxed its conformity with the majority rule of non-liability. See *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927) (dissent called for allowance of suit by the infant); *Segall v. Ohio Casualty Company*, 224 Wis. 379, 272 N. W. 665 (1937); *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33 (1940); and *Fidelity Savings Bank v. Aulik*, 252 Wis. 602, 32 N. W. 2d 613 (1948).

¹⁰ *McCurdy*, speaking of intra-family suits, suggests that "the strongest argument against such actions is . . . the danger of domestic collusion." *McCurdy, Tort Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1052-1053 (1930). However, there seems to be no evidence of a flood of fraudulent claims in jurisdictions which have eliminated the no-liability rule.

¹¹ If the courts are to be realistic in allowing the presence of insurance to destroy immunity in intra-family suits, they should also, of course, be realistic in allowing the actual defendants (the insurance companies) to protect themselves in the light of the true situation, without being hampered by technical procedural rules. Thus the insurance company should not be prevented from impeaching the nominal defendant (the insured) by a mechanical application of the rule against impeaching one's own witness. *Horneman v. Brown*, 286 Mass. 65, 190 N. E. 735 (1934) (impeachment allowed under Massachusetts statute); Note, 7 NEWARK L. REV. 101 (1941). But cf. *Newman v. Stocker*, 161 Md. 552, 157 Atl. 761 (1932); *Crothers v. Caroselli*, 126 N. J. L. 590, 20 A. 2d 77 (1941) (wherein the courts refused to shake off the shackles of the past). And the insurance company should be allowed to show the fact of insurance coverage and the relationship between the nominal parties, as it was in *Christie v. Eager*, 129 Conn. 62, 26 A. 2d 352 (1942).

¹² See note 9 *supra*.

would not apply even as against an unemancipated minor in a case where the burden of damages had in fact been shifted from the parent to an insurance carrier. Unhappily, there are few indications that the *Dunlap* case is being favorably received.¹³ Most courts have seen fit, ostrich-like, to hide their heads in the sands and to console themselves with the familiar platitude that, if the rule denying recovery is wrong, the burden of its correction lies with the legislature and not with the courts.¹⁴

The danger of such an attitude, from the viewpoint of one seeking a more rational system of tort rules, is that it results in the decision of cases based upon premises, often unexpressed, which are at total variance with reality. The minor's suit is treated as if the family exchequer were bearing the loss when in fact the loss is probably being distributed through the medium of insurance over the entire public or at least over a large segment of it.¹⁵ So long as the courts continue to examine such suits through the darkened glass of unreality, we can hardly hope to have better methods of distributing losses, which will minimize their catastrophic effects upon individuals.

C. The Suit by One Spouse Against Another

A problem something like that of the unemancipated minor arises in suits between husband and wife. Here again, one of the questions is whether allowance of the suit will lead to disruption of the home. Again also, it is hard to see how domestic harmony can be disrupted where the suit is not, practically speaking, brought by one spouse against the other, but by the spouse against the insurance company. Nevertheless, just as in the case of children, the majority of courts have persisted in disposing of the problem on the basis of mechanical adherence to precedent rather than on consideration of the problems of today, and have typically denied recovery.¹⁶ Gen-

¹³ A decision taking the same view as the *Dunlap* case is *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932), where the court, with commendable candor, stated, "Where no need exists for parental immunity the courts should not extend it as a mere gratuity."

The rule denying the right to sue has also been abolished in certain British Empire jurisdictions. See, e.g., *Young v. Rankin*, 1934 S. C. 499 (Scotland), and *Fidelity, etc. Co. v. Marchand*, 4 D. L. R. 913 (Canada). See also, *Worrell v. Worrell*, 174 Va. 11, 4 S. E. 2d 343 (1939), and *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935).

¹⁴ See, e.g., *Fidelity Savings Bank v. Aulik*, 252 Wis. 602, 32 N. W. 2d 613 (1948), where the court pointed out that the Wisconsin legislature was presumed to have observed the operation of the rule for a number of years and had done nothing towards modifying it. Hence, reasoned the court, it had no duty to take the initiative in modification.

It is interesting to note that the rule denying recovery in a suit by the unemancipated minor against his parent has not been extended to suits by brothers and sisters against each other. Recovery is typically allowed in such suits. See *Rozell v. Rozell*, 281 N. Y. 106, 22 N. E. 2d 254 (1939); *Munsert v. Farmers' Mutual Automobile Ins. Co.*, 229 Wis. 581, 281 N. W. 671 (1938).

¹⁵ Since under recent changes in rating practices, a lower rate is given to an insured whose car is not driven more than 7500 miles a year and who has no one in his family under 25 who regularly drives it, the general tendency at least in automobile insurance would be to distribute the premium cost of whatever extra hazards may attend youthful drivers among their parents.

¹⁶ The non-liability of one spouse for torts to the other during coverture had many legal justifications which the relatively recent immunity between parent and minor child never had. The relaxation of the restrictions as between husband and wife has been largely a matter of statute and statutory con-

erally, judges have simply reiterated, without seeking justification for it, the common-law thesis that "it is of course a settled matter that a wife may not have a suit for damages against her husband for his tort."¹⁷ This verbal formula has been treated as if in itself it was some magic touchstone which of necessity conjured up a just decision. Thus the hoary fiction of unity of the parties to a marriage, despite its supposed abolition by the Married Women's Acts, has, bolstered by misguided considerations of protecting familial tranquillity, retained sufficient vitality to prevent the presence of insurance from having significant effects in this area.¹⁸ Again the failure of the courts to look reality in the face results in the disposition of cases on principles which have little if any relation to a socially sound system of loss distribution.

D. The Direct Suit by an Injured Party Against the Insurer

The right of an accident victim to bring an action directly against the tort-feasor's insurer has undergone considerable change since the turn of the century. The early rule on this subject was clear. The insurance fund could not be reached by an injured party in a direct suit against the insurer (even after judgment against the insured), the theory being that the contract of insurance was limited in its scope to the insurer and the insured, and did not constitute a contract for the benefit of the injured party. Thus the injured party could not directly invoke its benefits.¹⁹

struction. It is for the purpose of construing equivocal statutes that some courts have here invoked the policy of protecting homes from disruption. See McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1031 *et seq.*, 1052 (1930).

¹⁷ *Hudson v. Gas Consumers' Association*, 123 N. J. L. 252, 8 A. 2d 337, 338 (1939); *Harvey v. Harvey*, 239 Mich. 142, 214 N. W. 305 (1927); *Newton v. Weber*, 119 Misc. 240, 196 N. Y. Supp. 113 (1922); *Kyle v. Kyle*, 210 Minn. 204, 297 N. W. 744 (1941). A considerable minority of jurisdictions permit such suits. See *Courtney v. Courtney*, 184 Okla. 395, 87 P. 2d 660 (1938). The general problem is discussed in Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L. J. 697, 893 (1939); Shumaker, *Action for Tort Between Husband and Wife*, 30 LAW NOTES 165 (1926).

¹⁸ *Schroeder v. Longenecker*, 7 F. R. D. 9 (E. D. Mo. 1947). Cf. *Le Blanc v. New Amsterdam Casualty Co.*, 202 La. 857, 13 So. 2d 245 (1943). Louisiana permits suit directly against the insurer, and, since the intra-family immunity is held to be personal to the family member, recovery can be had against the insurer. New York now permits tort suits by husband and wife against each other, and an insurance policy can lawfully cover such loss if it so provides. N. Y. DOM. REL. LAW §57; N. Y. INS. LAW §167 (3).

¹⁹ Exposition of the theory is found in *Bain v. Atkins*, 181 Mass. 240, 244, 63 N. E. 414, 415 (1902). The language of the court is worth careful note because it is representative of the then prevailing judicial thought. "The only parties to the contract . . . were Atkins [the insured] and the company. The consideration . . . came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to . . . the contract, but the terms of the contract do not purport to promise an indemnity for . . . any person other than Atkins. . . . It [the contract] contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. . . . The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins in which the plaintiff had no legal or equitable interest, any more than in other property belonging absolutely to Atkins."

See also *Clark v. W. R. Bonsal & Co.*, 157 N. C. 270, 275, 72 S. E. 954, 956 (1911) where it was said: "An ordinary indemnity contract of this character is not made for the benefit of the employee, either in its express terms or in its underlying purpose. It is made for the protection and the indemnity of the employer, fortifying him against unexpected and uncertain demands which might otherwise prove disastrous to his business, and the rights arising under such a contract are his property, and actions to recover the same are and should be under his control."

Early efforts were made to reach the insurance fund through garnishment proceedings against the insurer as garnishee or by equitable proceedings seeking to require the insurer's indebtedness to the insured to be applied *pro tanto* to the satisfaction of the insured's indebtedness to the plaintiff. The theory was that, once the insured's liability to the plaintiff was established, the fund of the policy became a debt due from the insurer to the insured and, therefore, an asset of the insured which the injured party could reach by appropriate proceedings. Some of these efforts were successful. Thus, in *Anoka Lumber Co. v. Fidelity & Casualty Co.*,²⁰ the Minnesota court construed the insurance policy as one of insurance against liability, rather than a contract of indemnity, and concluded that the injured party could reach the insurance fund once the insured's liability to the injured party had been established by final judgment.²¹ The insurers, however, got around the effect of such decisions by simply putting suitably drawn "no action" clauses in their policies. These provide in substance: "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the insured, himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." Confronted with this ingenious language the courts generally took the view that the policy was one of indemnity against loss rather than of insurance against liability. From that view the conclusion irresistibly followed that garnishment proceedings by the injured person could not be maintained against the insurer nor could equitable remedies be employed to reach the fund.²² While policies where the "no action" clause in this form did not appear were still construed to be policies of insurance against liability rather than for indemnity against loss,²³ most policies were written with the "no action" clause,²⁴ and an injured claimant could rarely obtain relief against the insurance carrier. The anomalous situation was thus presented that if the insured were solvent so that a judgment for damages could be collected against him, the insurance company would pay, but if the insured were insolvent so that the judgment against him could not be collected, the company would not pay.²⁵

Fortunately remedial legislation came forth to solve the difficulty at least in part. The general effect of the legislation was to permit the injured party to sue the

²⁰ 63 Minn. 286, 65 N. W. 353 (1895) (employers' liability policy).

²¹ An early case reaching the same conclusion was *Hoven v. Employers Liability Assurance Corp.*, 93 Wis. 201, 67 N. W. 46 (1896).

²² *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881 (3d Cir. 1906).

²³ Compare *Carter v. Aetna Life Ins. Co.*, 76 Kan. 275, 91 Pac. 178 (1907), with *Blanton v. Kansas City Cotton Mills Co.*, 103 Kan. 118, 172 Pac. 987 (1918).

²⁴ See *Luger v. Windell*, 116 Wash. 375, 377-378, 199 Pac. 760, 761 (1921), holding that "A policy with those conditions is a policy of indemnity, and . . . a judgment creditor, when his judgment remains unpaid, cannot, by garnishment, compel its payment from the insurance company which had insured the judgment debtor."

²⁵ This paradox was discerned by many courts. In *Staggs v. Gotham Mining & Milling Co.*, 208 Mo. App. 596, 235 S. W. 511 (1921), the court recognized the situation, referring to it as a "gross injustice," but expressed the opinion that the remedy, if any, lay with the legislature rather than with the courts. While the legal situation was as described, it must be noted that many companies probably did not choose to take full advantage of it. See ELMER W. SAWYER, *AUTOMOBILE LIABILITY INSURANCE* 2-3 (1936).

insurer directly once the insured's liability was established by final judgment, any clauses to the contrary being ineffective.²⁶ Such statutes provide that no policy of insurance against loss or damage shall be issued unless it contains a provision that the bankruptcy or insolvency of the person insured shall not release the insurer from the payment of damages and that, after judgment has been obtained against the insured, in case execution is returned unsatisfied, an action can be maintained by the injured person directly against the insurer.²⁷

Louisiana and Wisconsin seem to have gone further than any other jurisdictions in making the insurance fund immediately available to the injured party. The Louisiana statute provides, "... that the injured person shall have a right of direct action against the insurer company within the terms, and limits, of the policy in the parish where the assured has his domicile, and said action may be brought either against the insurer company, alone or against both the assured and the insurer company, jointly and *in solido*."²⁸

E. Governmental Immunity

Insurance is also gradually making itself felt in the area of governmental and charitable immunity. The rule of governmental immunity in tort is well established in the common law,²⁹ and in the absence of the consent of a governmental unit no action can normally be maintained against it.³⁰ Originally flowing in part from the notion that the "King can do no wrong," the immunity today rests largely on the more pedestrian principle that taxpayers' money should be utilized for public

²⁶ Judge Finch analyzed the purpose of the statutes in *Jackson v. Citizens Casualty Co.*, 277 N. Y. 385, 389, 14 N. E. 2d 446, 447 (1938): "Prior to the enactment of Section 109 of the Insurance Law, an injured person possessed no cause of action against the insurer of the tort-feasor because of the lack of privity of contract. In consequence, if the insured was insolvent, so that the person injured or the estate of one killed was unable to satisfy the judgment against him, the insurer in effect would be released. The policy being one of indemnity against loss suffered by the principal, it followed that, the insured having suffered no damage, there was no loss for the insurer to indemnify. For the purpose of correcting this situation with its attendant injustice the Legislature enacted this remedial statute which became Section 109 of the Insurance Law." See also, *Shea v. United States Fidelity Co.*, 98 Conn. 447, 120 Atl. 286 (1923).

²⁷ Such statutes have been sustained against charges that they conflict with the due process clause of the federal constitution and with the federal bankruptcy laws. *Merchants Mutual Automobile Liability Ins. Co. v. Smart*, 267 U. S. 126 (1925).

²⁸ Act 55 of Louisiana Laws (1930); Wis. STAT. §85.93 (1947). Under these statutes it is not even necessary to sue the insured. *Elliot v. Indemnity Ins. Co. of North America*, 201 Wis. 445, 230 N. W. 87 (1930). The Louisiana statute seems to have paved the way for a real liberalization of the old immunities. *Edwards v. Royal Ind. Co.*, 182 La. 171, 161 So. 191 (1935); *Lusk v. United States Fidelity and Guaranty Co.*, 199 So. 666 (La. App. 1941). The Wisconsin statute has not. *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33 (1940); *Fehr v. General Accident Fire & Life Assurance Corp.*, 246 Wis. 228, 16 N. W. 2d 787 (1944).

²⁹ Much editorial discussion has been occasioned by this rule. See, e.g., Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 293 (1942); Borchard, *Government Liability in Tort*, 34 YALE L. J. 1 (1926), *Governmental Responsibility in Tort*, 28 COL. L. REV. 577 (1928), *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A. B. A. J. 747 (1934).

³⁰ *Bang v. Independent School District No. 27*, 177 Minn. 454, 225 N. W. 449 (1929); *Benton v. Board of Education*, 201 N. C. 653, 161 S. E. 96 (1931); *Boice v. Board of Education*, 111 W. Va. 95, 160 S. E. 566 (1931).

projects and not for the satisfaction of individual claims.³¹ The injustice of the immunity, particularly in view of the intrusion of government into fields once reserved to private enterprise, has been recognized,³² and remedial statutes providing for governmental liability have been widely enacted.³³

Many governmental subdivisions have themselves recognized the inequity of their absolute immunity status and have on their own initiative attempted to protect injured parties by carrying insurance. This raises many problems however. Where the government subdivision is immune, a court may say that the procurement of insurance is an illegal expenditure of government funds because the payment of premiums is completely unnecessary.³⁴ And even where that argument is not advanced, most courts hold that the mere presence of insurance against liability cannot bring into being a liability which would not otherwise exist.³⁵ Moreover, the contention that obtaining insurance constitutes a waiver of immunity may be met by the notion that power to waive resides only in the legislature.³⁶ A claim that the governmental unit is estopped to assert its immunity is likely to fare no better.³⁷ Even where the governmental unit insists that the insurer agree to waive the defense of immunity, such a provision may well be ineffectual, at least in the absence of statutory authority to insure,³⁸ a result which is shocking indeed. There operation of school busses),³⁹ and even some of them have been so construed as not are relatively few statutes which give this authority for specific activities (such as

³¹ Note, 33 MINN. L. REV. 634, 636 (1949); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 440 (1941).

³² See *Claims Against the State in Minnesota*, 32 MINN. L. REV. 539 (1948); Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942).

³³ For example, FEDERAL TORT CLAIMS ACT, 60 STAT. 842, 28 U. S. C. §921-46 (1946); CALIFORNIA VEHICLE CODE §400 (1943); N. Y. CT. OF CLAIMS ACT §8; See Lloyd, *Municipal Tort Liability in New York*, 23 N. Y. U. L. Q. REV. 278 (1948).

³⁴ See *Lambert v. City of New Haven*, 129 Conn. 647, 30 A. 2d 923 (1943), and Borchard, *Recent Statutory Developments in Municipal Liability in Torts*, 2 LEGAL NOTES ON LOCAL GOVERNMENT 89 (1936).

³⁵ See Note, 145 A. L. R. 1336 (1943). In a very able note on the effect of insurance upon the various immunities dealt with in the present article, it is pointed out that two types of contracts are written on governmental risks. One is written at a premium substantially lower than that for a private organization just because of the immunity. The other is issued at a regular premium rate with an endorsement inserted in the policy at the insured's request providing that the insurer will not avail itself of the insured's immunity. Note, 33 MINN. L. REV. 634, 643 (1949). Where the former type of contract is involved, the reason stated in the text is not altogether unjustified.

³⁶ *Boice v. Board of Education*, 111 W. Va. 95, 160 S. E. 566 (1931); *Kesman v. School Dist. of Fallowfield Township*, 345 Pa. 457, 29 A. 2d 17 (1942).

³⁷ Note, 33 MINN. L. REV. 634, 640 (1949).

³⁸ *Ibid.*; *Jones v. Scofield Bros.*, 73 F. Supp. 395 (D. Md. 1947) (the statute casually mentioned in the opinion refers to insurance, but would seem to mean the kinds of insurance which would protect the bondholders' security, e.g., property insurance). MD. CODE Art. 89B, §140 E (Cum. Supp. 1947). Cf. also *Pohland v. Sheboygan*, 251 Wis. 20, 27 N. W. 2d 736 (1947) (where neither such a clause nor express statutory authority to insure avoided the immunity).

Such a result may be a logical enough corollary of the older notion that insurance was the private concern of the contracting parties (a notion frequently embodied in a "no action" clause in the policy).

³⁹ Three-fourths of the states, for instance, have no statutory authority allowing school districts to carry insurance. Note, 33 MINN. L. REV. 634, 638 (1949). Some statutes provide for insurance which will cover the individual liability of officers and employees, and thus the question of immunity is circumvented. Others have been construed as a legislative modification of the immunity to the extent

to disturb existing immunities (but simply to permit buying insurance against whatever liabilities the government unit has).⁴⁰ From all that has been said, it is apparent that the effect of insurance on the legal doctrines in this field has not been nearly so great as it may well come to be.⁴¹

Another problem which arises in the governmental immunity area concerns the right of an insurance company, which has paid a claim and thus become owner by subrogation of the injured party's cause of action, to sue the governmental instrumentality which has brought about the injury. This problem has finally been settled, at least federally, in favor of the allowance of such a suit, by the recent decision of the United States Supreme Court in *United States v. Aetna Casualty and Surety Co.*⁴² The Supreme Court rejected the Government's argument that statutes waiving sovereign immunity must be strictly construed and expressed its belief that the congressional attitude in passing the Federal Torts Claims Act⁴³ was more accurately reflected in this quotation from Judge Cardozo: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."⁴⁴ The Court therefore concluded that an insurance company could bring suit in its own name against the Government upon a claim to which it had become subrogated by payment to an insured. The importance of the decision may be gleaned from the fact that in argument before the Court the Assistant Attorney General stated that over 11,000 actions against the United States, involving hundreds of millions of dollars, awaited the result of the case. What it means is that private risk distributors can shift some of their losses to the Government, which in turn will redistribute these losses through taxation.

F. Charitable Immunity

The problem which arises in the case of charitable corporations is not unlike that in the governmental unit situation. The immunity of charities is not so extensive as that of governmental bodies, but its operation is similar. The charitable assets

involved in reaching the insurance. See generally the authorities collected in the note cited above; also see Note, 145 A. L. R. 1336 (1943); *Taylor v. Knox County Board of Education*, 292 Ky. 767, 167 S. W. 2d 700 (1942); *Taylor v. Cobble*, 28 Tenn. App. 167, 187 S. W. 2d 648 (1945); *Standard Accident Insurance Co. v. Perry County Board of Education*, 72 F. Supp. 142 (E. D. Ky. 1947). Cf. *Perrodin v. Thibodeaux*, 191 So. 148 (La. App. 1939); *Earl W. Baker & Co. v. Lagaly*, 144 F. 2d 344 (10th Cir. 1944).

⁴⁰ See, e.g., *Pohland v. Sheboygan*, 251 Wis. 20, 27 N. W. 2d 736 (1947). Of course even where there is such a statute it may be no help because the governmental unit either in fact failed to insure, or failed to carry out its obligations under the policy. *Utz v. Board of Education*, 126 W. Va. 823, 30 S. E. 2d 342 (1942).

⁴¹ It may well be true, however, that settlement practices (under policies carrying full premiums) are more liberal than the written law, except where the insurance companies feel the claim is exorbitant or unjust. See Note, 33 MINN. L. REV. 634, 646 n. 52, 653 n. 95 (1949). But are our courts or the insurance companies better tribunals for determining the justice or exorbitance of claims?

⁴² 338 U. S. 366 (1949).

⁴³ 28 U. S. C. §§1346 (b) and 2674 (1946).

⁴⁴ *Anderson v. John L. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30 (1926).

have been regarded as a "trust fund" to be used only for purposes specified by the donor which purposes supposedly exclude payment of damages, and it has sometimes also been said that sound public policy prohibits the depletion of charitable funds through private judgments.⁴⁵ Some jurisdictions have taken the view that where insurance is present there is no depletion of the "trust fund," so that the defense of immunity is not available in cases where the charity is insured against liability.⁴⁶ Unfortunately, this position is still a minority one;⁴⁷ some courts reject it because they base charitable immunity on a ground other than the "trust fund" theory.⁴⁸ Another argument is that the imposition of liability would be reflected in increased premiums which would have to be paid out of trust funds. The argument would be sound if the policy to protect trust funds from bearing their share of the social cost of accident caused by administering the trust were a valid policy. As things really stand, however, the presence of insurance only serves to point up the fact that instead of spelling ruinous loss to occasional individual charities, liability may mean only the payment of a reasonable and calculable sum in premiums.⁴⁹ Liability has also been denied on the theory that insurance cannot create a liability which would not exist in the absence of insurance.⁵⁰ This notion seems to be closely related to the older concept of insurance as a private contract of indemnity which is of no concern to those who were not parties to the contract. As we have seen, however, that attitude has undergone a radical change; courts and legislatures more and more are looking upon liability insurance as a means of protecting the interests of the injured victim and of society. It is likely, therefore, that this reason for denying liability here will continue to lose the vitality of its appeal. At least in cases where the charity has paid the regular premium for insurance and stipulated with the insurer that the immunity defense will not be raised, the upholding of the immunity by the courts seems to lack any real justification.⁵¹

II

INSURANCE AND NON-DOCTRINAL FACTORS AFFECTING TORT LIABILITY

The effect of liability insurance in the field of accidents is by no means confined to its impact upon the legal rules. There is a question, for example, of the deterrence of dangerous tortious conduct. While it is commonly recognized that questions

⁴⁵ For an able study of the rise and recession of the immunity of charities doctrine see the opinion of Justice Rutledge in *President and Director of Georgetown Hosp. v. Hughes*, 130 F. 2d 810 (D. C. Cir. 1942).

⁴⁶ See *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939); *Vanderbilt University v. Henderson*, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938); *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. 2d 342 (1947).

⁴⁷ Note, 33 MINN. L. REV. 634, 651 (1949).

⁴⁸ See, e.g., *Christini v. Griffin Hospital*, 134 Conn. 282, 57 A. 2d 262 (1948).

⁴⁹ See comments of Rutledge, J., in *President & Director of Georgetown Hosp. v. Hughes*, 130 F. 2d 810, at 820 (D. C. Cir. 1942).

⁵⁰ *Christini v. Griffin Hospital*, note 48 *supra*; *Greatrex v. Evangelical Deaconess Hosp.*, 261 Mich. 327, 246 N. W. 137 (1933). Cf. *Levy v. Superior Court*, 74 Cal. App. 171, 239 Pac. 1100 (1925).

⁵¹ Cf. note 35 *supra*. Recovery was allowed under such a policy in *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. 2d 342 (1947).

of fault and of "risk-shifting" are important in tort law, it should also be remembered that tort doctrines can be appraised in terms of their deterrent effect. All other things being equal, it seems obvious that a rule of law which tends to prevent the occurrence of torts is superior to one that does not. It is well recognized that insurance brings about wide distribution of losses. It is also fairly generally admitted that such risk-distribution is desirable. But what of the effect of insurance on this other aim of tort law—the prevention of torts? Probably insurance has produced beneficial effects in this direction also. At least there is no substantial reason to believe that the existence of wide-spread insurance has fostered irresponsibility.

The large-scale organizations and the huge commitments of capital represented by insurance companies make it possible for safety programs to be carried out. Individual companies have made efforts along these lines, and coordination has proceeded through such groups as the National Conservation Bureau of the Association of Casualty and Surety Executives.⁵² In some lines of insurance greater sums are currently spent on accident prevention than are paid out on accident claims.⁵³ Another way in which insurance companies can act preventively is in the adjustment of their rates and selection of their risks.⁵⁴ Whatever the causes, in many fields where insurance is well-nigh universal, accident rates have been drastically reduced. Thus great strides towards safety have been made in the care of elevators, boilers, and machinery.⁵⁵ Industrial fatalities were cut in half between the two world wars.⁵⁶ In aviation, responsibility for important safety advances has been claimed by insurance companies.⁵⁷

Far less success in promoting safety has been attained in the automobile field.⁵⁸ Here, in the case of the individual car owner at any rate, the insurance companies can exert less pressure than in the case of larger risks with centralized management which can implement safety measures and campaigns. Moreover, it is harder to devise effective ways to select risks and to adjust rates to the individual's own past

⁵² The Bureau has divisions of industrial safety, traffic engineering, safety education, special service, and information and library. These divisions study accidents scientifically, formulate safety rules and try to inculcate these rules in the general public, particularly through the public schools.

⁵³ E.g., in the case of Hartford Steam Boiler Inspection & Insurance Company the ratio for the period 1936-1945 of net losses to underwriting income was approximately 24 per cent, while the ratio of expenses to underwriting income was approximately 79 per cent. For further illustrations along these lines, see *The Spectator* (Property Ins. Rev.), June 13, 1946, pp. 14-15.

⁵⁴ See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L. J.* 549, 560 (1948).

⁵⁵ Sawyer, *Retooling Casualty Insurance*, 45 *BEST's* 37 (1945).

⁵⁶ Hall, *Everybody's Job*, 47 *BEST's* 85, 96 (1947); cf. 39 *BEST's* 749 (1939).

⁵⁷ Perry, *Aviation Insurance*, 46 *BEST's* 31 (1945).

⁵⁸ Automobile accidents continue to exact an appalling toll of death and serious injury. Death will claim the 1,000,000th auto accident victim in the United States late in 1951 or early in 1952. Since 1907 927,260 persons have been killed by automobiles as compared to 796,500 by industrial accidents in the same period. (The dead of all this country's wars total 852,000.) During 1949, 31,500 persons were killed in automobile accidents and 16,500 in industrial accidents. Address of John Cruickshank, Chief Safety Engineer of a leading casualty insurance company, before the twentieth annual convention and exposition of the Greater New York Safety Council. *The N. Y. Times*, March 29, 1950, p. 31, col. 1.

safety record.⁵⁹ But even in the automobile field this much at least can be said—insurance does not make matters worse. Safety records are on the whole best where the greatest proportion of motorists is insured.⁶⁰ And new techniques for achieving safety may well enable the companies to have better success in cutting down these losses.⁶¹

III

INADEQUACIES IN THE PRESENT SYSTEM

Insurance goes far in the direction of providing some protection to the injured party. It has been observed that in automobile accident cases there is only one chance in four that the injured party will receive any payment where the tortfeasor does not carry insurance, while if insurance is carried, some payment will be made in 85 per cent of the cases.⁶² But there is a darker side of the picture. While recent figures on the subject are not available, the Columbia University study completed in 1932⁶³ indicated that insurance payments covered the actual losses in about three-quarters of the temporary disability cases, but very often failed to cover the losses sustained in serious injury or death cases. Even in death cases the payments were relatively small, ranging from \$500 to \$3,000. Furthermore, the victim or his legal representative often was forced to resort to protracted litigation in order to obtain payment. The larger the claim, the more likely was it to be opposed rather than settled, and even if the claim was settled the Columbia study tended to show that in serious injury and death cases the claimant or his representative often settled it for a relatively small amount in order to avoid the expenses of litigation. Strangely enough, then, the system often works out in a way exactly opposite to what is socially desirable. If the claim is a small one, it is very likely to be paid in full or even overpaid, because any claim has a certain "nuisance" value and the company is likely to settle rather than incur the expenses of litigation. But, if the claim is very large—which means that the hardship and need are very great, as in the serious injury and death cases—the company is in a relatively stronger bargaining position and the claimant in a weaker one. The worse the injury, the less the chance that it will be fully redressed.⁶⁴

⁵⁹ Attempts have been made at various reward plans for individual drivers designed to encourage safety. Sawyer, *Frontiers of Liability Insurance*, 39 *BEST'S* 439 (1938). But such plans have largely been abandoned. 43 *BEST'S* 13-14 (1942).

⁶⁰ See HARRY SHULMAN AND FLEMING JAMES, JR., *CASES AND MATERIALS ON TORTS* 708 (1942).

⁶¹ See, e.g., James and Dickinson, *Accident Proneness and Accident Law*, 63 *HARV. L. REV.* 769 (1950).

⁶² Smith, *Compensation for Automobile Accidents—A Symposium*, 32 *COL. L. REV.* 785, 793 (1932). Dean Smith's figures are based upon the report of the Columbia University Council for Research in the Social Sciences, dated February 1, 1932.

⁶³ See note 62 *supra*.

⁶⁴ While the foregoing analysis is based in large measure upon the Columbia report and, hence, is subject to inaccuracy because of the intervention of almost twenty years since that report was compiled, it is believed that relevant changes in insurance practice have been insubstantial, so that the main points of the Columbia report probably hold good today just as much as they did in 1932.

IV

RECAPITULATION AND SUGGESTIONS

"The accident problem of our mechanical age calls for two things: accident prevention and the compensation of the victims of accidents that *do* happen."⁶⁵ Analysis of the development of legal rules indicates that insurance has had relatively minor effects on these rules as such. A few modifications have occurred in respect to the rules of parental immunity, immunity between husband and wife, governmental immunity, and charitable immunity; but these modifications have not been accepted by the majority of courts. Considerable improvement has been noted in the area of direct suits by injured parties against insurance companies, but even there difficulties still exist.

As to the advances in safety which have been produced by insurance, it can be said that such advances have been substantial, particularly in the area where large risks are insured with the consequent ability of the companies more directly to control the activities of insured persons, but safety campaigns have not achieved very much success in the automobile accident field where they are most needed. Insurance in this field seems to have fallen far short of a complete solution of the social problem. Many losses occur which cannot be redressed. Insurance coverage is still not as widespread as it should be,⁶⁶ and payments made, particularly in serious accident cases, are very often inadequate to cover the losses sustained. The only answer, at least in the automobile accident area, which is the principal unsolved problem of tort liability today, would seem to lie in the adoption of some form of compensation scheme.

It is not here proposed to elaborate on the mechanics of such a scheme. Suffice it to say that automobile compensation could be patterned after the workmen's compensation systems, which have been widely adopted. The same conditions would seem to obtain in the automobile accident field as in the workmen's compensation area. In both instances there is exacted regularly, year after year, a certain toll of property damage and human suffering. In both instances a measure of such damage seems to be a necessary concomitant of industrial civilization. This is not to say that the toll cannot be reduced. Certainly it can and should be. But even with successful safety campaigns there will always be a basic residuum of destruction, and it seems clear that the consequences of this destruction should be borne by society at large, rather than by the individual. The individual's whole life may be blighted by one accident. It seems both illogical and unjust to say that his monetary redress for

⁶⁵ James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549, 569 (1948).

⁶⁶ The Columbia report, note 62 *supra*, indicated that less than one-third of the automobiles in the United States were insured. Smith, *Compensation for Automobile Accidents—A Symposium*, 32 COL. L. REV. 785, 793 (1932). Undeniably the proportion today is larger with the enactment of financial responsibility laws, but there is still a substantial danger that the defendant in an automobile accident case will be completely uninsured and, in such cases, the possibility of recovery is almost non-existent.

such an accident must rest upon a successful hurdling of the network of legal rules and insurance practices which may thwart his recovery. The principle of fault, whatever may be its merits in certain areas of tort, clearly seems to have no sound application in a field where injuries are so widespread as to be virtually a necessary incident of industrial society.

It is certain that any proposed compensation scheme will run into serious difficulties. For example, the question of just how far its administration shall be public or private is certain to raise heated controversy. The question of the extent of coverage and the amount of premiums will also require long study. Yet while the problems are great, the need also is great, and the principle seems clear. Insurance in the law of torts has served during the past fifty years to modify some legal rules and to broaden both the base of recovery and the possibility of recovery. It may be that another fifty or a hundred years would see this process of evolutionary growth culminate in a system that would insure adequate compensation to the victims of all accidents.⁶⁷ Certain it is, however, that such is not the case today, and the next logical step is to accelerate the slow process of expansion of insurance coverage by the adoption of a system of automobile accident compensation.

⁶⁷ Cf. Friedman, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949) (outlining trends in English law).